

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:

MARITIME COMMUNICATIONS/LAND MOBILE, LLC

EB Docket No. 11-71

Participant in Auction No. 61 and Licensee of
Various Authorizations in the Wireless Radio Services

File No. EB-09-IH-1751
FRN: 0013587779

Applicant for Modification of Various
Authorizations in the Wireless Radio
Services

Application File Nos.
0004030479, 0004144435,
0004193028, 0004193328,
0004354053, 0004309872,
0004310060, 0004314903,
0004315013, 0004430505,
0004417199, 0004419431,
0004422320, 0004422329,
0004507921, 0004153701,
0004526264, 0004636537,
and 0004604962.

Applicant with ENCANA OIL AND GAS (USA), INC.;
DUQUESNE LIGHT COMPANY;
DCP MIDSTREAM, LP;
JACKSON COUNTY RURAL MEMBERSHIP
ELECTRIC COOPERATIVE;
PUGET SOUND ENERGY, INC.;
ENBRIDGE ENERGY COMPANY, INC.;
INTERSTATE POWER AND LIGHT COMPANY;
WISCONSIN POWER AND LIGHT COMPANY;
DIXIE ELECTRIC MEMBERSHIP CORP., INC.;
ATLAS PIPELINE—MID CONTINENT, LLC;
DENTON COUNTY ELECTRIC COOPERATIVE,
INC., d/b/a COSERV ELECTRIC; and
SOUTHERN CALIFORNIA REGIONAL
AUTHORITY

Accepted / Filed

APR 29 2015

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Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch, Secretary
Attention: The Commission

ENL-VSL INTERLOCUTORY APPEAL AS OF RIGHT

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Date: April 29, 2015

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ENL-VSL INTERLOCUTORY APPEAL AS OF RIGHT

Pursuant to 47 C.F.R. § 1.301(a)(1), Environmental LLC and Verde Systems LLC (together, “Appellants”), file this interlocutory appeal of FCC 15M-14 (the “Order”). The Order, which alleges that Appellants, together with Warren Havens *pro se* (“Havens,” and collectively, “EVH”), misled the Presiding Judge and delayed this proceeding, should be overturned as arbitrary and capricious and an abuse of discretion. As noted below, Maritime intentionally misrepresented multiple times that it had not abandoned its licenses, only to stipulate later that it abandoned 73 licenses. The Order is directed at the wrong party.

I. Summary of the Order Under Appeal

The Order (a) strikes an October 27, 2014 motion by EVH seeking summary decision on Issue G in this proceeding (the “Motion”), (b) finds that EVH have been disruptive or contemptuous, and as a result, (c) bars Havens and all companies he manages (together, the “HHCs”)¹ from future participation in this proceeding.² The primary purported justifications for this drastic and damaging sanction are:

- (1) Counsel for Appellants allegedly intentionally misled the ALJ when it said in a motion that the Enforcement Bureau (the “Bureau”) would be filing a summary judgment motion “identical” to one the Bureau had previously filed;
- (2) EVH filed the allegedly unauthorized Motion; and
- (3) Nineteen examples of alleged “unacceptable conduct” that are essentially (a) positional disagreements between EVH and other parties or the Presiding Judge in the course of regular advocacy, or (b) complaints about the communication style of Havens, an acknowledged *pro se* party.

II. Background on This Proceeding and Appellants’ Role and Participation

The Order disqualifies EVH from further participation in this proceeding, which only

¹ The Order bans all HHCs from the proceeding, although misconduct by only EVH is alleged.

² The Order also certifies to the Commission the question of whether the behavior described in the Order should be designated for a separate proceeding to consider Appellants’ qualifications to hold Commission licenses at all. Appellants reserve the right to address this even more serious—and even less reasonable—sanction in a separate pleading.

exists because of 9 years of diligence by the HHCs, acting as whistleblowers to inform the Commission of numerous violations of auction rules by Maritime in the process of winning 4 licenses in Auction 61. Five years after the HHCs showed the Commission Maritime's violations, the Commission issued a Hearing Designation Order that admitted the HHCs as parties to the proceeding and validated the HHCs' allegations by finding substantial and material questions of fact exist regarding whether Maritime had misled the Commission or otherwise violated Commission rules in Auction 61 and subsequent investigations. In September 2014, after multiple misrepresentations by Maritime that it had not abandoned its licenses, Maritime stipulated that it had in fact abandoned 73 of its 89 site-based licenses (precisely as EVH had argued). In December 2014, a hearing was held on the remaining 16 licenses. The Bureau and Maritime jointly argued that Maritime should keep the 16 licenses, again leaving EVH as the only parties to challenge the propriety of Maritime holding them. The Presiding Judge acknowledged this was "the first case [he] ever had where the Bureau comes around the other end and assists the respondent." Tr. at 1180. No disruption of the hearing by EVH was alleged.

Phase 2 of the proceeding—the very heart of the proceeding that the HHCs began—will start 2 days from now. If allowed to stand, the Order will prevent EVH from participating in Phase 2, leaving Maritime and the Bureau as the only active parties in the proceeding.

III. The Order Is Arbitrary and Capricious and an Abuse of Discretion

A. The Presiding Judge's Conclusion that Counsel for Appellants Intentionally Sought to Mislead Him is Unreasonable

The Presiding Judge "is most concerned with" an alleged intentional misrepresentation by Appellants of the Bureau's position regarding its response to the Motion. Order at ¶ 9. This is a tempest in a teacup and should be easily disposed of. The Presiding Judge's interpretation of Appellants' characterization of the Bureau's position in 2 pleadings as "identical"—that "the offending statement [about identical pleadings] . . . was not made to characterize a pleading,

but . . . to misinform the [Presiding Judge]”—is tortured and unreasonable. The word “identical” has multiple meanings: (1) “being the same”; (2) “having such close resemblance as to be essentially the same”; or (3) “having the same cause or origin.”³ Appellants clearly used the term in the latter senses, but the Presiding Judge relies on the first definition to conclude Appellants misrepresented that the Bureau intended to file *exactly* the same motion as it had previously submitted, rather than one that seeks the same result. This is arbitrary.

The Presiding Judge’s assertion that he detrimentally relied on Appellants’ alleged misrepresentation ignores that the Bureau challenged Appellants’ characterization of its planned response. The Bureau and Appellants filed arguments on the issue of the fairness of Appellants’ characterization of the Bureau’s planned filing, thereby eliminating any risk that the Presiding Judge would be misled by an alleged mischaracterization.⁴ The Order confirms (at ¶ 9) the Bureau admitted to the Presiding Judge that it planned to file a motion seeking the same relief requested in a prior motion—that Maritime keep the 16 stations—just as Appellants asserted.

If, as the Presiding Judge states, this is the most concerning aspect of Appellants’ conduct in this proceeding, there is plainly no basis to disqualify Appellants from further participation.

B. The Motion was Legitimately Filed and Contained Reasonable and Routine Advocacy Designed to Simplify, Not Disrupt or Delay, the Proceeding

The Motion was reasonable and routine advocacy. Unlike the Bureau and Maritime, which filed 3 unsuccessful motions for summary decision, causing concern they might file a fourth, EVH filed only 1 such motion (after the conclusion of the Bureau’s and Maritime’s direct cases), arguing that even assuming the facts asserted by them to be true, their cases fail as a matter of law. It was not filed with “gratuitous impudence,” nor was it filed for delay or to be

³ Merriam-Webster’s Collegiate Dictionary 575 (Frederick A. Mish et al. eds., 10th ed. 2006).

⁴ Exhibit 1 contains excerpts from the relevant submissions showing the dialogue on this issue. The Order is thus incorrect that Appellants did not clarify the meaning of their statements.

contemptuous. On the contrary, it was intended to obviate the need for a hearing, thereby allowing the proceeding to move expeditiously to Phase 2.

Though the Presiding Judge's July 15 order said he would not entertain further summary decision motions, this admonition was clearly addressed to the concern that Maritime and the Bureau might file a *fourth* such motion, despite the fact that a hearing was set for September 30. Two weeks later the Presiding Judge continued the hearing *sine die* and directed a new hearing calendar (FCC 14M-22). Then, on September 11, the stay on Phase 2 of the proceeding was lifted. The circumstances had changed dramatically by the time the Motion was filed: the hearing date had been extended from September 30 to December 9, Maritime's *Second Thursday* application had been denied, and Maritime and the Bureau had filed their direct cases, so it was reasonable for EVH to conclude that the July 15 order had been superseded. Moreover, the July 15 directive was not in the Order's ordering paragraphs, it was dicta, as the Presiding Judge himself acknowledged. Tr. at 1260 ("I gave that dictum on summary decision July 15, 2014.").

Even if EVH erred in their conclusion that the Presiding Judge's July 15 order did not apply to them, the filing of the motion cannot be viewed as "disruptive" or "contemptuous" because he did not dismiss the Motion. In fact, *he directed the parties to try to resolve the case on pleadings as suggested by the Motion, which they agreed to do. Order at ¶ 6 (stating that the parties "agreed to have the Presiding Judge entertain the Havens [M]otion")*. Ultimately, the parties were unable to agree and a hearing was held. Now, five months after deciding to entertain the Motion, as well as reaping the benefits of EVH's adversarial participation in the hearing and their April 8 filing of the only findings of fact *not* representing Maritime's interests in the case, the Presiding Judge strikes and dismisses the Motion and sanctions EVH. This is arbitrary and capricious and an abuse of discretion.

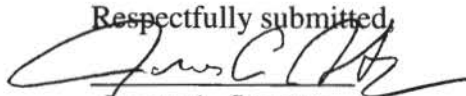
IV. The Other Instances of Allegedly Objectionable Conduct Do Not Support Disqualification of EVH

It is impossible to respond to a 14-page, single-spaced order containing a laundry list of alleged wrong-doing in the 5 double-spaced pages allotted for interlocutory appeals. As discussed above, the Order should be summarily overturned due to the irrationality and impropriety of the two dominant concerns raised in the Order.

With respect to claims that the HHCs' *pro se* communications were inappropriate or disruptive, the simple answer is that the Presiding Judge allowed (and not infrequently complimented) the HHCs' extensive *pro se* actions, and he cannot now reasonably take the extreme step of disqualifying them based upon conduct typical of a *pro se* litigants that are not attorneys. Lastly, with regard to claims about the alleged disruptiveness of certain of EVH's other pleadings, like the Presiding Judge's response to the filing of the Motion, he had ample opportunities to admonish or sanction EVH for allegedly improper, contemptuous, or disruptive filings when they were made, but he chose not to do so in his discretion as case manager. It is unreasonable now, after he has allowed these allegedly disruptive or contemptuous acts to occur over months and years, to punish EVH, who have shouldered so much of the burden of this case.

If the Commission is not prepared to rule in Appellants' favor based on this appeal, due process requires that Appellants be given a reasonable opportunity to respond to the Order's litany of misstatements, mischaracterizations of Appellants' reasonable advocacy, and *ad hominem* attacks on EVH's character.

Respectfully submitted,



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Date: April 29, 2015

EXHIBIT 1

EXCERPTS REGARDING "IDENTICAL" FILING FROM NOVEMBER 2014 MOTION PRACTICE

1. ENL-VSL Response Regarding Suspension of the Hearing Schedule (original filing)

The Bureau contacted ENL-VSL counsel after the Conference and asserted that if ENL-VSL agree to suspend the hearing, the Bureau will file a motion for summary decision that will be identical to the motion for summary decision that the Bureau filed jointly with Maritime on December 2, 2013 ("Joint Motion") and supplemented on March 26, 2014 ("Supplement"). ENL-VSL counsel sent the Bureau an email stating that ENL-VSL would not agree to suspend the hearing schedule, since the Bureau's position has not changed from the Joint Motion.

2. Enforcement Bureau's Motion To Strike ENL-VSL's and Mr. Havens' Summary Decision Status Report (Bureau's response)

ENL-VSL's Response states that the Bureau informed counsel for ENL-VSL that it "will file a motion for summary decision that will be identical to the motion for summary decision that the Bureau filed jointly with Maritime on December 2, 2013 ("Joint Motion") and supplemented on March 26, 2014 ("Supplement")." That is incorrect. The Bureau proposed that it would file a countermotion for summary decision in which it would argue, as it had in its previous motion, that operations of certain of Maritime's site-based stations were not permanently discontinued. The Bureau did not represent to counsel for ENL-VSL that it would rely on "identical" facts or file an "identical" motion.

3. ENL-VSL Opposition to Motion to Strike Status Report (Appellants' opposition)

The Motion denies ENL-VSL was informed the Bureau intends to file an identical motion for summary decision to that filed December 2, 2013 ("SD Motion"), supplemented March 26, 2014 ("SD Supplement"), and rejected by the Presiding Judge on June 17, 2014, as to abandonment. Yet the Motion restates that Maritime is entitled to keep the 16 disputed stations. Since 16 equals 16, an identical motion is a fair description. EVH justifiably expressed alarm that the Bureau fails to acknowledge the facts and the applicable law.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this 29th day of April, 2015, arranged to be mailed by first class United States mail copies of the foregoing Interlocutory Appeal as of Right to:

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